IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

NATIONWIDE MUTUAL INSURANCE CO. A/S/O KENNETH W. JAMES,	)	
Plaintiffs	)	
	)	No: 2007-07-223
v.	)	
RUTH L. PEREZ-REYES,	)	
Defendant	)	

Date Submitted: June 19, 2009
Date Decided: July 7, 2009

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FINAL ORDER AND OPINION ON DEFENDANT'S MOTION TO VACATE DEFAULT JUDGMENT

A hearing on Defendant's Motion to Vacate Default Judgment was presented before this Court on June 19, 2009. Following argument from both parties, the Court reserved decision. This is the Court's final order and opinion.

Facts:

This is an insurance subrogation action arising out of a motor vehicle accident that occurred on November 11, 2006. The complaint alleges that on that date, a vehicle

owned by Plaintiff Kenneth W. James ("James") was impacted by another motor vehicle that was negligently, recklessly, and/or wantonly operated by Defendant Ruth L. Perez-Reyes ("Perez-Reyes"). Plaintiff Nationwide Mutual Insurance Co. ("Nationwide") instituted this action on behalf of James to recover $6,210.11 which Nationwide paid to James pursuant to his motor vehicle insurance policy.

Perez-Reyes was personally served with the praecipe, summons, and complaint on August 5, 2007. She subsequently failed to file a responsive pleading within 20 days of service, as required by Court of Common Pleas Civil Rule 12(a). On August 28, 2007, Plaintiffs' counsel directed the Clerk of the Court to enter default judgment pursuant to Civil Rule 55(b)(1) against Defendant in the amount of $6,210.11, plus pre- and post-judgment interest at the legal rate and $125 court costs.

Perez-Reyes has since retained counsel, who prepared the instant motion, originally filed on December 11, 2008. After being scheduled and continued several times, the motion was presented at a hearing held on June 19, 2009.

In support of the motion to vacate, Perez-Reyes submitted affidavits prepared by herself and her boyfriend, Michael Rosengren ("Rosengren"). The affidavits both state that in August 2006, Defendant had sold the vehicle allegedly involved in the accident. They further state that the transfer was reported to the Department of Motor Vehicles ("DMV") and that the insurance on the vehicle was cancelled. As for Perez-Reyes' failure to file a timely responsive pleading, the affidavits state that Perez-Reyes is of Hispanic descent, cannot read, write or speak English, and relied on Rosengren's advice and translation of the praecipe and complaint. While neither affidavit is clear on what exactly that advice was, it is apparent that Rosengren felt that rather than filing a

responsive pleading or obtaining counsel, it was best to attempt to contact Plaintiffs' Counsel directly. Rosengren states that he first did so immediately after being served, and estimates that he called Plaintiff Counsel's office 20 times without receiving a return call. Both Perez-Reyes and Rosengren state that they did not understand that default judgment would be entered against Perez-Reyez if she failed to respond.

Also in support of the motion, Perez-Reyes submitted a series of exhibits regarding the transfer of the vehicle and the accident. Exhibit A contains a printout from the Motor Vehicle and License System noting that the vehicle was reported transferred on August 16, 2006. Exhibit A also contains a Sellers Report of Sale, with a partially typed, partially handwritten form indicating the sale of the vehicle on August 16, 2006 from Perez-Reyes to one Artemio Perez Gonzalez for $750. Exhibit B contains a memo from Blair Marr of The Insurance Market Inc. advising that a 1995 Saturn SL1 was removed from Perez-Reyes' policy effective August 21, 2006 because she no longer owned the vehicle. Finally, Exhibit C contains the police report from the accident at issue, identifying Perez-Reyes as the owner of the Saturn.[1]

Plaintiffs oppose the motion to vacate default judgment and submitted a written response in support thereof. Plaintiffs argue that should the motion be granted, the prejudice to them is substantial due to the amount of time that has passed since the entry of default judgment. Plaintiffs further assert that Perez-Reyes has not sufficiently shown "excusable neglect" for her failure to file a responsive pleading. Specifically, Plaintiffs point to the language in the Summons which clearly explains that default judgment may

[1] No explanation has been submitted as to why the police report indicated that Perez-Reyes owned the vehicle at the time of the accident, while the DMV records suggest otherwise.

be entered if the Defendant fails to file a responsive pleading within 20 days.[2] In the alternative, Plaintiffs counsel requests that the Court award attorney's fees incurred in opposing this motion, plus the costs transferring the judgment to Superior Court, totaling $3,065.

Discussion:

A motion to vacate a default judgment pursuant to Court of Common Pleas Civil Rule 60(b)(1) "is addressed to the sound discretion of the Trial Court."[3] Courts view such motions with favor because they promote Delaware's strong judicial policy of deciding cases on the merits.[4] Although Rule 60(b) should be construed liberally, a party moving to vacate a default judgment must satisfy three elements before a motion under that rule will be granted: 1.) excusable neglect in the conduct that allowed the default judgment to be taken; 2.) a meritorious defense to the action that would allow a different outcome to the litigation if the matter was heard on its merits; and 3.) a showing that substantial prejudice will not be suffered by the plaintiff if the motion is granted.[5] "The Court should only consider the second two elements of the three pronged test if a satisfactory

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[2] The standard language included in the Summons reads, in relevant part:

> Within twenty days after you receive your copy of this Summons, excluding the day upon which you receive your copy of this Summons, you must file your Answer to the attached copy of the Complaint if you wish to formally deny the allegations that have been set forth against you therein…Your failure to file your Answer to the attached copy of the Complaint formally denying the allegations that have been set forth against you therein may result in the entry of a Default Judgment against you, and action may be taken by the plaintiffs and/or by their legal counsel to satisfy the aforesaid Default Judgment.

[3] *Battaglia v. Wilmington Sav. Fund Soc 'y,* 379 A.2d 1132, 1135 (Del.1977); Rule 60(b)(1) provides, in relevant part: "On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for…mistake, inadvertence, surprise, or excusable neglect…or any other reason justifying relief from the operation of the judgment"

[4] *Lee v. Charter Communications VI, LLC*, 2008 WL 73720 (Del. Super.)

[5] *Battaglia v. Wilmington Sav. Fund Soc 'y,* 379 A.2d at 1135 (Del.1977); *Lee v. Charter Communications*, VI, LLC, 2008 WL 73720 at *1 (Del. Super.)

explanation has been established for failing to answer the complaint, e.g. excusable neglect or inadvertence."[6] "Excusable neglect" has been repeatedly defined by the Delaware Courts as "that neglect which might have been the act of a reasonably prudent person under the circumstances."[7] "A Defendant cannot have the judgment vacated where it has simply ignored the process."[8]

Plaintiffs suggest that Perez-Reyes' negligence in failing to file a responsive pleading was so gross as to amount to sheer indifference. *See Vechery v. McCabe*, 100 A.2d 460 (Del. 1953). In *Vechery*, the defendant received a summons and did nothing for a six-week period, after which the papers were turned over to his insurance company. The Court in *Vechery* refused to vacate the judgment which was entered.

Unlike the defendant in *Vechery*, however, Perez-Reyes did not completely ignore the process. The facts indicate that Perez-Reyes expected a non-judicial resolution of this dispute, due to her understanding that there had been a mistake regarding the identity of the driver involved in the accident. For that reason, she contacted Mr. Sipe's office to discuss the matter. The uncontroverted testimony is that Mr. Sipe repeatedly neglected to return her calls.

Vechery has been distinguished by Delaware Courts where there has been a misunderstanding regarding settlement negotiations. For example, in *Canton Inn, Inc. v. Security Insurance Co.*, 1986 WL 2258 (Del. Super.), the defendant, who did not understand English, engaged in settlement discussions with opposing counsel through his attorney. Although a trial date was subsequently set, the defendant was under the impression that he did not need to appear because the case had been resolved out of court.

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[6] *Apt. Cmtys. Corp. v. Martinelli,* 859 A.2d 67, 72 (Del.2004).
[7] *Battaglia v. Wilmington Sav. Fund Soc 'y,* 379 A.2d 1132, 1135 (Del.1977).
[8] *Cummings v. Jimmy's Grille, Inc.,* 2000 WL 1211167, at *3 (Del.Super.)

After the trial court entered default judgment against the defendant, the Superior Court later vacated the judgment, finding that the defendant's actions constituted excusable neglect. Similarly, in both *Holtzman and Saxe v. Colony Pool Service of Delaware, Inc.*, 1987 WL 6444 (Del. Super.) and *Estate of Hazlett v. Reliance Insurance Co*., 1991 WL 113593 (Del. Super.), default judgment was entered while settlement negotiations were open. In both cases, the default judgment was later vacated upon motion.

The difference between this case and this trio of cases, of course, is that there were no settlement discussions between the parties here—there were only attempts to engage in such discussions by Rosengren on behalf of Perez-Reyes. However, to distinguish this line of cases based on the failure of these communications—caused by Plaintiffs' Counsel's repeated refusal or neglect to talk with Rosengren—would set a dangerous precedent that would only encourage a lack of cooperation among litigants. The fact that there were no actual settlement discussions here was not the fault of Perez-Reyes. The Court therefore finds that Perez-Reyes has shown excusable neglect in the conduct that allowed the default judgment to be taken.

Proceeding to the second prong of the Rule 60(b) analysis, Perez-Reyes must next show a meritorious defense to the action that would allow a different outcome to the litigation if the matter was heard on its merits. The Court finds that she has done so. As stated above, the affidavits and exhibits submitted in support of the instant motion display that the vehicle involved in the accident which was allegedly owned by Perez-Reyes had been sold several months before the accident. If Perez-Reyes was indeed not the owner nor driver of the vehicle at issue, this would of course negate liability for the underlying action.

Third, in order to have the default judgment vacated, the defendant must show that substantial prejudice will not be suffered by the plaintiff if the motion is granted. Nationwide contends that it will suffer substantial prejudice due to the amount of time that has passed since default judgment was entered almost two years ago. "Although 'substantial prejudice' has not been explicitly defined in Delaware case law, the Court of Chancery has applied the standard that substantial prejudice may exist where circumstances have changed so as to impair the plaintiff's ability to litigate its claim."[9] The facts here are insufficient to bar relief under Rule 60(b). Plaintiffs have not shown any reason why the passage of time has impaired their ability to litigate this claim.

Finally, Plaintiffs' Counsel has requested that the Court award attorney's fees incurred in obtaining default judgment and defending the instant motion. While the Court recognizes that additional costs have been incurred by Plaintiffs in defending this motion, such costs could likely have been avoided had Plaintiffs' Counsel responded to Rosengren's repeated requests to discuss the case.

For the foregoing reasons, Defendant's Motion to Vacate Default Judgment is hereby GRANTED.

SO ORDERED this 7th day of July, 2009

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WILLIAM C. BRADLEY
JUDGE

[9] *Stonington Partners, Inc. v. Lernout & Hauspie Speech Products, N.V.*, 2002 WL 31439767 (Del Ch.)